

DOCKET FILE COPY ORIGINAL

RECEIVED

FEB 13 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
) MD Docket No. 95-3
)
Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 1995)

**COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ respectfully submits its comments on the Notice of Proposed Rule Making in the above-captioned proceeding.²

I. Introduction

In the Notice, the Commission proposes several revisions to its Schedule of Regulatory Fees and payment procedures for Fiscal Year 1995.³ Specifically, the Commission proposes

¹ CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry. CTIA and its members have a direct and vital interest in the outcome of this proceeding.

² *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, MD Docket No. 95-3, Notice of Proposed Rule Making, FCC 95-14 (released January 12, 1995) ("Notice").

³ Section 9 of the Communications Act, as amended, authorizes the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out its enforcement activities, policy and rule making activities,

that each cellular licensee submit a fee based upon the total number of telephone numbers or call signs that the licensee provides to its customers.⁴ Thus, each cellular licensee will be required to pay an annual regulatory fee for each cellular unit, e.g., cellular call sign or telephone number, assigned to its customers.⁵

While the FCC proposes a regulatory fee based upon the number of cellular call signs or telephone numbers assigned to a cellular customer, the Commission does not address the need to safeguard the confidentiality of fee calculations based upon such data that can be used to obtain the subscriber count of wireless carriers.⁶ Accordingly, CTIA respectfully

user information services, and international activities. See 47 U.S.C. § 159 (1994).

⁴ Notice, ¶ 44. For fiscal year 1994, the Commission required a fee payment based upon the number of subscribers. See *In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, MD Docket No. 94-19, FCC 94-140, 59 Fed. Reg. 30984 (June 16, 1994) ("FY 1994 Order").

⁵ Notice, ¶ 44.

⁶ In a companion proceeding, CTIA has requested the Commission to address the confidential treatment of subscriber data and urged the Commission to amend Section 0.457(d) of its Rules to include a provision that specifically addresses confidential treatment of regulatory fee computations based upon subscriber data. See *In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, MD Docket No. 94-19, Petition for Reconsideration of the Cellular Telecommunications Industry Association, filed July 18, 1994.

requests that the Commission amend Section 0.457(d) to include a provision that addresses confidential treatment of regulatory fee computations based upon any data that could reveal the subscriber count of wireless carriers, i.e., the number of telephone numbers or call signs assigned to a wireless customer.

II. Regulatory fee calculations based upon the number of call signs and telephone numbers assigned to a customer can reveal commercially sensitive subscriber count data.

The Commission's proposal concerning regulatory fee payments based upon the number of call signs or telephone numbers assigned to a cellular customer addresses the Commission's concern that the fee payment reflect "the benefit that the licensee receives from its use of frequencies of communications."⁷ However, the Commission fails to recognize that in a cellular market where a single call sign or a single telephone number is assigned to each customer, the number of subscribers served by the wireless carrier can easily be obtained by counting the number of telephone numbers or the number of call signs the carrier provides in that particular market. Thus, regulatory fee payments based upon the number of telephone numbers or call signs that a carrier provides to its customers can reveal accurate and commercially sensitive subscriber data of wireless carriers.

⁷ Notice, ¶ 44.

III. Regulatory fee calculations based upon any data that reveals subscriber counts are confidential information that must be shielded from public disclosure under Section 0.457 of the Commission's rules.

Section 0.457 (d)(i)-(iv) of the Commission's rules . identify specific categories of financial reports that are not routinely available for public disclosure pursuant to exemption four of FOIA.⁸ The Commission automatically shields such reports from public disclosures.⁹

Wireless carriers guard their market-specific subscriber counts as confidential financial data, and generally do not report such information on a disaggregated basis, unless they have adequate assurances that such information will be safeguarded from public disclosure.¹⁰ The availability of

⁸ The categories of reports include financial reports submitted by broadcast licensees pursuant to Section 1.611 of the Commission's rules, including fees computed from information contained in financial reports submitted pursuant to Section 1.611; schedules 2, 3, and 4 of financial reports submitted for cable systems pursuant to Section 76.403; and annual fee computation forms submitted for cable systems pursuant to Section 76.406. See 47 C.F.R. §§ 0.457(d)(1)(i), (d)(1)(iii), and (d)(1)(iv) (1993).

⁹ 47 C.F.R. § 0.457(d)(1)(1993). In amending Section 0.457(d)(1)(iv), the Commission recognized "the proprietary nature of the quarterly subscriber data requested by Form 326-A [CATV Annual Financial Report]" and granted automatic confidential treatment of annual fee computation forms submitted for cable television. See *Order*, FCC 71-1234, adopted December 8, 1971, released December 20, 1971.

¹⁰ For example, CTIA's carrier members provide aggregated data for CTIA's semi-annual Data Survey. Neither CTIA nor its outside auditors who assemble the data are privy to the

data such as the number of telephone numbers and call signs assigned to a subscriber can reveal an accurate subscriber count within a specific market. Such information makes it easier for competitors to know how many subscribers are within a defined market and to gauge the effect of their marketing efforts within that market. This can dampen competition.¹¹

Accordingly, CTIA respectfully requests the Commission to amend Section 0.457(d) to include a provision that specifically address confidential treatment of regulatory fee computations based upon any data that can reveal the subscriber count of wireless carriers, including the number of

market specific information required by the Commission's new fee reports. Furthermore, it has taken the Commission six months in its attempt to provide safeguards for the release of proprietary information, including the release of subscriber data, in several of the state preemption proceedings pending before the Commission. See PR Docket Nos. 94-103, 94-105, 94-106 and 94-108. While the Commission has provided for limited disclosure under a protective order in these dockets, it is too early to determine whether a protective order will successfully safeguard subscriber data in the increasingly competitive wireless industry.

¹¹ CTIA has provided the Commission with an antitrust analysis that explains how certain factors and behavior can facilitate collusion by competitors. See Besen et al., Charles River Associates, "An Antitrust Analysis of the Market for Mobile Telecommunications Services," submitted as Appendix A to CTIA Petition for Reconsideration, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, Gen. Docket No. 90-314 (December 8, 1993) ("Besen Antitrust Study"). See also *Besen Antitrust Study* at 52 (citing J.J. Rotemberg and G. Saloner, *A Supergame-Theoretic Model of Price Wars During Booms*, 76 *American Economic Review* 390-407 (1986)).

call signs and the number of telephone numbers assigned to a customer.

IV. Section 0.459 does not provide adequate safeguards from public disclosure.

In the *Notice*, the Commission specifically stated that it does not propose to revise its rules concerning the payment of fees for cellular licensees, except extending the regulatory fee to all units provided by cellular licensees.¹² It is also unclear from the *Notice* whether wireless carriers are still under an obligation to report subscriber data with its regulatory fee payment. Although the Commission's proposal requires fee payments based upon the number of call signs or telephone numbers assigned to customers, the Schedule of Regulatory Fees listed in Appendix B and the text of the *Notice* indicates an annual regulatory fee based upon per subscriber rather than per call sign or telephone number.¹³ Assuming that cellular licensees are under an obligation in fiscal year 1995 to provide data which reveals subscriber count, Section 0.459 of the Commission's rules do not provide adequate safeguards as demonstrated by the Freedom of Information Act (FOIA) Request recently filed by the Personal Communications Industry Association (PCIA).

¹² *Notice*, ¶ 44.

¹³ *Notice*, ¶ 44.

On February 6, 1995, PCIA filed a FOIA request with the Commission and specifically requested disclosure of records concerning the number of payee units and the amount of fees collected in connection with the FY 1994 regulatory fees of cellular licensees.¹⁴ Cellular carriers who met their reporting obligations in accordance with the Commission's rules and procedures are now faced with the possibility of public disclosure of data which reveals their subscriber count.

Under the Commission's current rules and practices, an entity, e.g., a parent company, may submit a single, aggregate payment to cover the regulatory fees due for each of its wireless systems or licenses.¹⁵ For fiscal year 1994, the Commission allowed cellular carriers to report the subscriber data associated with their regulatory fee payments in one of three methods: 1) Cellular carriers could distribute their total number of subscribers in the same manner provided for other public mobile service providers;¹⁶ 2) cellular carriers

¹⁴ See Freedom of Information Request of the Personal Communications Industry Association, dated February 6, 1995, in Letter to Mr. Andrew S. Fishel, Managing Director, Federal Communications Commission, ¶¶ 7, 8.

¹⁵ FY 1994 Order, ¶¶ 53-55.

¹⁶ Other public mobile service providers were allowed to list all the call signs for their systems and distribute the total number of subscribers by (1) allocating one subscriber to every call sign, except one and allocate the remainder of the subscribers to the remaining call sign; or (2) use an average number of subscribers per call sign. See Public Notice, *The Most Commonly Asked Questions and Responses About*

that operate in several markets could make a single, aggregate payment, list the call signs/licenses associated with the payment, and provide one aggregate subscriber number for all call signs/licenses; and 3) carriers reporting single market information must provide the subscriber data and seek confidential treatment of the data under Section 0.459 of the Commission's rules. While these methods provided a temporary response to the concerns regarding the confidentiality of wireless carriers' subscriber data for FY 1994, there is no indication that such methods are available for FY 1995. Moreover, in view of PCIA's FOIA request and the increasing competition in the wireless industry, such methods do not necessarily provide consistent and adequate safeguards from public disclosure of data which can reveal the subscriber counts of wireless carriers.

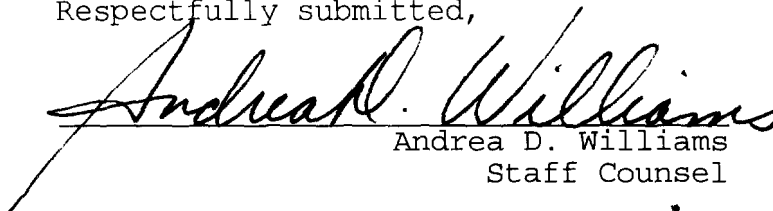
CONCLUSION

For the foregoing reasons, CTIA urges the Commission to amend Section 0.457 of its rules. CTIA maintains that regulatory fee computations of wireless carriers include confidential financial information falling within exemption 4 of FOIA, i.e., data that provides market specific subscriber count. In addition, Section 0.457 provides a more appropriate

FCC Regulatory Fees, dated August 16, 1994, at 6. See also, Videotape of FCC Regulatory Fee Seminar held August 16, 1994, Washington, D.C. (CTIA's Staff Counsel, Andrea Williams, requesting clarification of regulatory reporting requirements specifically for cellular carriers.)

safeguard against public disclosure of such information than
Section 0.459.

Respectfully submitted,


Andrea D. Williams
Staff Counsel

Michael F. Altschul
Vice President/General Counsel

**Cellular Telecommunications
Industry Association**
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

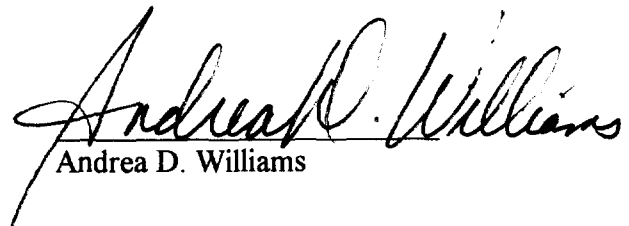
February 13, 1995

CERTIFICATE OF SERVICE

I, Andrea Williams, hereby certify that on this 13th day of February, 1995 the foregoing Comments of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

International Transcript Service
1919 M Street, N.W., Room 246
Washington, D.C. 20554


Andrea D. Williams